our 'Appendix A', the English uses 'Appendices'. The *Supreme Court Practice 1982*, Vol 1, at p 9 under the effect of the rule it is stated:

> 'The need for these prescribed forms is to ensure, so far as possible, uniformity and conformity in the practice and procedure of the High Court. They must be used whenever applicable, but nevertheless a certain latitude is permitted, so that these forms are allowed to be used 'with such variations as the circumstances of the particular case require'. This latitude is intended to mitigate excessive formality and technicality, when a variation to meet the requirements of a particular case would make the form more valuable and suitable as an instrument to achieve the real objective of the form ...'

The learned Chief Justice went on to quote a passage from *Mallal's Supreme Court Practice* (2nd Ed) at p 7.

I observe that O 39 r 3(2) of the RHC itself provides for the letter of request to be in Form 76 *with such variations as the order may require*. In view of the proceedings being criminal in nature, the forms must of necessity vary to suit the particular circumstances of the criminal case pending before this court and the objection of Mr Ronald Khoo on the variations in the forms cannot be sustained.

On the issue of the admissibility of the depositions at the criminal trial raised by Mr Ronald Khoo, in my view, even if there is merit in such a contention it is premature to raise it at this stage. The steps taken by the applicant for the present moment are purely to record evidence of certain witnesses in Hong Kong. Now, whether there is a similar provision as our O 66 of the RHC in the Hong Kong legislation and the admissibility of certain evidence over there is a matter for the applicant to consider and I am sure the applicant knows what he is doing otherwise it will be an exercise in futility.

In the circumstances I am of the view that the applicant can resort to O 39 of the RHC in this case and the order was rightly granted. The application of the respondent is dismissed with costs.

Application dismissed.

Solicitors: *Shim Pang & Co.*

Reported by *Mathavan Devadas*

Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP KOD D4-28-562-89
ZAKARIA YATIM J
12 JUNE 1990

Companies and Corporations — Winding up — Undue preference — Payment made by respondent to one creditor while petition is pending — Whether undue preference — Whether transaction could be validated — Companies Act 1965, s 223

In this petition the petitioner is seeking the order of the court to wind up the respondent on the ground that the respondent is unable to pay its debts. A sum of $50,000 had been paid by the respondent to one supporting creditor in settlement of the debt. The respondent had also transferred a piece of land to the creditor. The petitioner contended that this was an undue preference of one creditor over another after the petition had been presented and therefore contrary to ss 223 and 293 of the Companies Act 1965.

Held, ordering that the money paid to the supporting creditor be returned to the company:

(1) The payment of the $50,000 by the respondent to one supporting creditor as well as the transfer of the piece of property of the respondent to the creditor were dispositions of the property of the respondent to the creditor after the winding-up petition had been presented and such dispositions are contrary to s 223 of the Companies Act 1965 and therefore void.

(2) The question of validating a transaction is at the discretion of the court but a person who seeks such an order must make an application for such an order. In the present case there is no such application. In any event even if there is an application, this is no proper case for the court to make such an order. If a validating order is made, the preferred creditor would be paid a substantial sum of money at the expense of the other creditors.

Cases referred to

1 *Re Miles Aircraft Ltd* [1948] 1 Ch 188 (not folld)
2 *Re AI Levy (Holdings) Ltd* [1964] 1 Ch 19 (refd)
3 *Re Wiltshire Iron Co* (1868) 3 Ch App 443 (refd)
4 *Re Clifton Place Garage Ltd* [1970] Ch 477 (refd)
5 *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 (refd)
6 *Commonwealth Industrial Gases Ltd* v *Dorcon Constructions Pty Ltd* (1988) 14 ACLR 201 (refd)
7 *Lian Keow Sdn Bhd & Ors (In Liquidation) & Anor* v *Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 (folld)
8 *Datin Hajjah Zaleha & Ors* v *Perkasa Trading Sdn Bhd & Anor* [1984] 1 MLJ 372 (refd)

Legislation referred to

Companies Act 1965 s 223

Gurubachan Singh for the petitioner.
KY Leong for the respondent.

Cur Adv Vult

Zakaria Yatim J: In this petition the petitioner, Kimoyama Elektrik (M) Sdn Bhd is seeking the order of the court to wind up the respondent company, Metrobilt Construction Sdn Bhd (hereinafter referred to as 'the company') on the ground that the company is unable to pay its debts.

There are other creditors of the company who attended the hearing of the petition. Three of the creditors, viz Miliweb (M) Sdn Bhd, Arab-Malaysian Merchant Bank Bhd, and Syarikat Pembinaan Low Eng Moh Sdn Bhd, are opposing the petition. One other creditor, Fullmark (M) Sdn Bhd ('Fullmark'), is also present at the hearing. Fullmark has given notice of its intention to support the petition.

At the commencement of the hearing of the petition, Mr CK Tan, counsel for Fullmark, told the court that Fullmark was withdrawing itself as a supporting creditor in the petition. Mr Gurubachan Singh, counsel for the petitioner, objected to Fullmark withdrawing itself from supporting the petition. He said that a sum of $50,000 had been paid by the company to Fullmark in settlement of the debt. He added that the company had also transferred a piece of property to Fullmark in addition to the amount paid. He submitted that this was an undue preference of one creditor over another after the petition had been presented and therefore contrary to ss 223 and 293 of the Companies Act 1965.

Mr CK Tan confirmed that a sum of $50,000 was paid to him as stakeholder. According to him he was to hold the money pending the outcome of the hearing of the petition. He added that the money was paid by the parent company in Singapore, which was a third party and a different entity altogether. Mr KY Leong, counsel for Syarikat Pembinaan Low Eng Moh, told the court that the money was paid by the company itself.

It is now necessary to consider whether it was proper for the company to settle its debt with one creditor while a petition for winding-up is pending before the court. Section 223 of the Companies Act 1965 states:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court shall unless the Court otherwise orders be void.

Encik Mohd Ismail, counsel for the company, submitted that s 223 refers to disposition of property after the company had been wound up. In support of his submission, he cited *Re Miles Aircraft Ltd.*[1] In that case, the applicants, who held an equitable charge on the assets of the company, applied to the court under s 173 of the Companies Act 1929 for an order that a contract entered into by the company to sell certain premises should not be void. The contract was made on the day after the presentation of the petition for winding up. In considering the object of s 173, Vaisey J referred to s 153 of the Companies Act 1862 and held that the court had no jurisdiction to make such an order unless a winding-up order had been made.

In a subsequent case, *Re AI Levy (Holdings) Ltd*,[2] Buckley J disagreed with the decision in *Re Miles*[1] saying, at p 27, that the object of s 227 of the Companies Act 1948 (which is similar to s 173 of the Companies Act 1920):

> ... is to protect the interests of creditors from the possibly unfortunate results which would ensue from the presentation of a petition, and to protect their interests as much during the period while the petition was pending as after an order has been made on it. What the section provides in its present terms is that any disposition of the property of the company made after the commencement of the winding up shall be void in the winding up of the company unless the court otherwise orders...

Mr Gurubachan Singh contended that under s 223 the payment of the money to Fullmark after the petition was filed was void unless the company applied to the court for a validating order. He cited a number of cases in support of his contention. I shall now examine these cases.

The first case he cited was *Re Wiltshire Iron Co.*[3] In that case Lord Cairns LJ correctly interpreted the meaning of s 153 of the Companies Act 1862. In his judgment in that case, Lord Cairns said:

> [Section 153] no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up, shall, unless the court otherwise orders, be void. This is a wholesome and necessary provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis...

The present English equivalent of our s 223 is s 227 of the English Companies Act 1948. The next case cited by Mr Gurubachan Singh was *Re Clifton Place Garage Ltd.*[4] In that case a petition to wind up the company was presented on 30 November 1966. It was a wholly-owned subsidiary of another company which had granted a debenture for $20,000 on the security of a floating charge. On 24 December 1966, the debenture holders appointed a receiver and manager. The liquidator claimed from the receiver repayment of £4,024.10s 7d paid by the company into a special account on the ground that it was a disposition of the company's property made after the commencement of the winding up, which dated back to the presentation of the petition and therefore void under s 227 of the Companies Act 1948. Harman LJ in his judgment at p 490, referred to s 227 and said, 'This was undoubtedly a disposition made after the date of the presentation of the petition and is, therefore, a void disposition...'.

Another case cited by Mr Gurubachan Singh was a decision of the English Court of Appeal. In that case the Court of Appeal decided, inter alia, that the payments into the company's account during the period from the date a winding-up petition was presented up to the date a winding-up order was made constituted dispositions of the company's property within s 227 of the Companies Act 1948. See *Re Gray's Inn Construction Co Ltd.*[5]

Mr Gurubachan Singh also referred to an Australian case, *Commonwealth Industrial Gases Ltd* v *Dorcon Constructions Pty Ltd*.[6] This case was decided by the Supreme Court of the Northern Territory of Australia. In that case the Supreme Court was considering s 227 of the Companies Act 1963 (NT) which is identical to our s 223. In his judgment in that case, Asche CJ referred to Lord Cairns LJ's judgment in *Re Wiltshire Iron Co*,[3] which he said, had been followed in a number of cases in Australia. Asche CJ also quoted a passage from the decision of the Full Court of the Federal Court which decided that s 227 proceeded upon the footing that a company against which a petition was presented should be deprived of the power to dispose of its assets pending the final hearing of the petition. He adopted a passage from another Australian case, which states, '... that payment of past debt ... will not be validated; in general, it is the very type of transaction which the section is designed to nullify, or void...'.

From the authorities cited above (with the exception of *Re Miles*[1]), it can be concluded that under s 223 of the Companies Act, the disposition of the property of the company after a winding-up petition has been presented is void unless the court makes a validating order. The purpose of the section is to protect the interests of creditors when a petition for winding up is presented. The court, however has the discretion whether or not to make a validating order. The court cannot exercise its discretion to make a validating order if the result of the order is to make one or more creditors being paid in full. In *Re Gray's Inn*,[5] Buckley LJ in his judgment at p 718 said:

> Since the policy of the law is to procure so far as practicable rateable payments of the unsecured creditors' claim, it is, in my opinion, clear that the court should not validate any transaction or series of transactions which might result in one or more pre-liquidation creditors being paid in full at the expense of the other creditors...

Applying the above principles to the present case, the payment of the $50,000 by the company to Fullmark as well as the transfer of the piece of property of the company to Fullmark were dispositions of the property of the company to Fullmark after the winding-up petition has been presented and such dispositions are contrary to s 223 of the Companies Act 1965 and therefore void. This conclusion is consistent with the view expressed by the Supreme Court in *Lian Keow Sdn Bhd & Ors (In liquidation) & Anor* v *Overseas Credit Finance (M) Sdn Bhd & Ors*.[7] In that case Seah SCJ in his judgment at p 455 made the following observation:

> The learned judge held (correctly in my view) that the transfers of the first, second and third portions of the estate to the first respondent were void by reason of s 223 of the Companies Act 1965 but he, however, in the exercise of his discretion, validated them. Learned counsel for the second appellant had submitted that the learned judge was wrong to validate these said transfers and that he had exercised his discretion on wrong principles. For the first respondent, learned counsel now concedes that these three dispositions were made at the time of registration at the Land Registry office and since all three of them were registered after the presentation of the winding up petition by the court on 13 November 1978 they were therefore void under s 223 of the Companies Act 1965.

The two other Supreme Court judges who sat in the panel agreed with Seah SCJ's observation quoted above. See also *Datin Hajjah Zaleha & Ors* v *Perkasa Trading Sdn Bhd & Anor*.[8]

The question of validating a transaction is at the discretion of the court but a person who seeks an order to validate a transaction must make an application for such an order. In the present case there is no such application. In any event even if there is an application, this is not a proper case for the court to make such an order. If a validating order is made, Fullmark would be paid a substantial sum of money at the expense of the other creditors.

For the reasons stated above, I order that the money paid to Fullmark be returned to the company and if any property has been transferred from the company to Fullmark, such transfer is null and void.

Order accordingly.

Solicitors: *Nashir Johal & Co; S Sothi Leong & Partners.*

Reported by *Kevin Mathews*